UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASSANDRA SHIH,

Plaintiff,

-against-

PETAL CARD, INC. f/k/a CreditBridge, Inc., ANDREW ENDICOTT, and JASON GROSS,

Defendants.

No. 18 Civ. 5495 (JFK)

OPINION & ORDER

APPEARANCES

FOR PLAINTIFF:
Peter S. Dawson, Eliot M. Schuman, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP

FOR DEFENDANTS:
Joshua Matz, Roberta A. Kaplan, John C. Quinn, Martha Fitzgerald, KAPLAN HECKER & FINK LLP

JOHN F. KEENAN, United States District Judge:

Plaintiff Cassandra Shih ("Shih"), a citizen of New Zealand and resident of New Jersey, brings suit against Defendants Petal Card, Inc. ("Petal"), a Delaware credit card company formerly known as CreditBridge, Inc., and Andrew Endicott ("Endicott") and Jason Gross ("Gross"), attorneys admitted to practice law in and residents of New York, (collectively, "Defendants") for breach of contract, breach of certain fiduciary duties, misappropriation of business idea, unjust enrichment, and unfair competition. Jurisdiction is based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a).

Before the Court is Defendants' motion to dismiss the Second Amended Complaint ("the SAC") pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, the Court finds that the SAC plausibly alleges that Endicott entered into an oral joint venture agreement with Shih, whereby he promised to build a "credit bridging" company with her, and that Endicott breached that partnership when he instead organized and incorporated such a company with his friend, Gross, thereby wrongfully depriving Shih of her interest in the joint venture. Accordingly, Defendants' motion to dismiss is DENIED as to Shih's claims against Endicott and certain of her claims against Gross and Petal, the new name for the "credit bridging" company that Shih alleges Endicott took for himself. The motion is GRANTED as to one claim against Gross and one claim against Petal.

I. Background

The Court takes the following facts and allegations from the SAC and, for the purpose of this motion, deems them to be true.

In 2014, Shih traveled to New York to complete an internship with the New Zealand Permanent Mission to the United Nations. (Second Am. Compl. ("SAC") ¶ 13, ECF No. 93.) While in New York, Shih met and befriended Endicott, a 2012 graduate of Harvard Law School who was working as a corporate attorney at

a large law firm. (Id. ¶¶ 14–16.) In July 2014, Shih's internship ended, and she returned to her native New Zealand. (Id. ¶ 18.) After Shih departed New York, she and Endicott kept in touch, communicating at least once a month or more. (Id. ¶ 19.)

In the summer of 2014, Endicott exited the law firm to take a job as an investment analyst at a large financial firm. (Id. ¶ 21.) During his conversations with Shih, however, Endicott repeatedly communicated that he was unhappy with his job at the financial firm. (Id. ¶ 22.) Shih communicated to Endicott her entrepreneurial ambitions and her desire to return to New York to live and work. (Id. ¶ 23.)

A. Endicott proposes that he and Shih "start a company together"

On or around April 24, 2015, Shih and Endicott exchanged the following messages via Facebook Messenger:

Endicott: Let's start a company together.
That does some cool trans-pacific stuff.

Shih: I'm so on board.
You got skills?

Endicott: I'm a lawyer and an investment banker.
I would say so.

Shih: I mean, how do you see them applying?

Endicott: I can raise financing, set up the company and understand ecommerce[.]
Keep the books, do taxes, manage employees[.]
I basically just need a product[.]

> Shih: Hahaha[.]
>
> Endicott: I'm not really kidding. I'm looking for something cool to sell and haven't really been able to find it[.]

(Id. ¶ 27.) During the conversation, Shih informed Endicott that New Zealand had a good startup community, but it lacked startup money. (Id. ¶ 29.) "I don't know that money is a huge issue," Endicott stated, "I think I can get money." (Id. ¶ 31.) Shih responded, "Well if you're serious, let's talk more." (Id. ¶ 32.)

B. Shih shares her business idea with Endicott

Over the weekend of April 25–26, 2015, Shih considered Endicott's proposal and decided that his experience as a New York-based attorney and investment banker could help her to incorporate and finance an idea she had for a credit bridging service for new migrants to the United States. (Id. ¶ 33.) The idea had come to Shih during her time in New York in 2014, when she observed that she and other expatriates were unable to obtain credit cards in the United States and frequently struggled to access credit to purchase cars, secure apartment leases, open bank accounts, or assist with daily expenses. (Id. ¶¶ 2, 34–35.) Shih believed a credit bridging service could help address this failure of the Fair Isaac Corporation ("FICO") credit scoring system, and she sought a partner to assist her

with organizing and securing financing for such a company. (Id. ¶¶ 36–37.)

Trusting Endicott as a friend, and finding it "particularly attractive" that he had offered his legal services and expertise as an attorney, and represented that he had contacts through his investment banking career that could lead to investors in a new company, on or about April 27, 2015, Shih proposed to Endicott her credit bridging idea. (Id. ¶¶ 38–40.) The following day, Endicott replied that he thought Shih's idea was "amazing" and "seriously very good," and he immediately began researching the issue of access to credit in the United States and sharing what he found with Shih. (Id. ¶¶ 42–48.)

On April 28, 2015, Shih and Endicott further discussed Shih's idea via Facebook Messenger. (Id. ¶ 49.) Endicott asked Shih to elaborate on the idea, and she described to him a company that could evaluate a customer outside of the FICO context by conducting a more representative assessment of an individual's creditworthiness, thereby enabling the individual to access credit in the United States. (Id. ¶ 50.) Shih explained that her company would independently "vet" the creditworthiness of individuals with no U.S. credit history, and it would extend credit or underwrite the risk of a U.S. bank's extension of credit to such individuals to allow them to access credit immediately. (Id.) Endicott said he thought "the idea

is viable," "[t]here's a problem, and this would solve that problem," and it was "a good idea." (Id. ¶ 52.) Shih and Endicott concluded their discussion with the following exchange:

> Endicott: Thanks!
> Let's create this thing[][.]
>
> Shih: [N]o worries, you said you wanted to start a business[.]
>
> Endicott: It will give you an excuse to run around the world some more[.]
>
> Shih: I do love that[.]
> I'm currently waiting on security clearance which is massively cramping my style[.]
>
> Endicott: Haha, sounds rough[.]
>
> Shih: [Y]ou have no idea. [O]kay anyway do some digging, let me know[.]
> [I]f all signs are still towards viability then we can start building a small team[.]
>
> Endicott: [S]ounds good[.]

(Id. ¶ 53.)

C. Shih and Endicott research and develop Shih's credit bridging concept

In May and June 2015, Shih and Endicott researched and discussed Shih's credit bridging concept via email, Facebook Messenger, Skype, and a shared Dropbox, and they used their collective research to create an investor presentation that Endicott began pitching to investors later that year. (Id. ¶ 56.) On April 29, 2015, Endicott emailed Berk Ustun ("Ustun"), a data scientist and purported "co-founder" of Petal, who later

became its Head of Data and is now an advisor to the company. (Id. ¶¶ 2, 57.) In the email, subject lined "FICO Outside the US," Endicott called the project he was working on "my idea." (Id. ¶ 57.) The next day, Endicott emailed Ustun that he may try to get information from two FICO employees. (Id. ¶ 59.) "Obviously not going to tell them my plan," Endicott wrote, "but these are PR guys anyway and aren't going to go out and steal the idea." (Id.)

On or about May 3, 2015, Shih wrote Endicott via Facebook Messenger to inquire whether he still thought the idea was viable. (Id. ¶ 64.) Endicott responded that he thought it was and advised Shih that he was continuing to research it and discuss it with third parties. (Id. ¶ 65.) Endicott also advised Shih that he was talking to people who they might consider bringing on board as part of their team. (Id. ¶ 66.) On or about May 5, 2015, Endicott sent Shih an email requesting her help with building out a market structure breakdown for the business. (Id. ¶ 67.) Shih provided input, and the two exchanged various emails in early May 2015 relating to the credit scoring process and whether their company would lend money in-house. (Id. ¶¶ 68, 70–71, 75–76.)

On or about May 7, 2015, Endicott sent an email to a freelance journalist who had written on the topic of access to consumer credit in the United States. (Id. ¶ 72.) Endicott's

email explained that he was "working with a group that's setting up a venture to tackle the gap in credit available to immigrants in the US due to various causes (e.g., lack of credit scores)" and asked if the journalist had time to speak about one of her articles on the subject. (Id.) Endicott blind copied Shih to the email; he did not blind copy Ustun. (Id. ¶¶ 72–74.) The SAC alleges that Endicott's blind copying Shih demonstrates that his references to a "group" and "venture" consisted of himself and Shih. (Id. ¶ 73.)

On or about May 7, 2015, Endicott forwarded to Ustun an email exchange between himself and Shih from May 6 and 7, 2015, with the subject line, "Credit to new migrants." (Id. ¶ 78; Ex. A to SAC, ECF No. 93-1.) In the email exchange between Endicott and Shih, Shih stated that she was "glad" Endicott was "warming to the idea of lending money in-house," to which Endicott replied, "Great, we're on the same page overall. I think your concept of bridging would be akin to being a guarantor, which is interesting and would be cheaper than lending itself." (SAC ¶¶ 75–76; Ex. A to SAC.) Endicott's message to Ustun, in which he forwarded his exchange with Shih, simply read "FYI." (SAC ¶ 78; Ex. A to SAC.) Later that day, Ustun replied to Endicott's message by asking, "Who is Cassie?" (SAC ¶ 79; Ex. A to SAC.) Endicott responded, "This chick I banged a few months ago who

came up with the idea. She lives in New Zealand." (SAC ¶ 80; Ex. A to SAC.)

D. Shih and Endicott name their venture CreditBridge and agree to approach potential investors

On or about May 10, 2015, Endicott shared a Dropbox folder with Shih titled "Credit Bridge Concept" and sent her an extensive email with the subject line "Big Questions" in which he proposed a delegation of labor between the two in the development of their business plan. (SAC ¶¶ 82–83.) Endicott asked if Shih had any thoughts on a business name for their venture and explained that he "will start cataloging people we could reach out to for financing and share that with you once it's in good shape." (Id. ¶ 84.) Endicott forwarded to Ustun his "Big Questions" email to Shih and wrote, "FYI." (Id. ¶ 85.) Over the next week, Endicott, Shih, and Ustun performed research and other tasks related to the "Big Questions." (Id. ¶¶ 86–92.)

On or about May 16 or 17, 2015, Shih and Endicott held a meeting over Skype to discuss the details of their business plan, including product development, potential team members and business partners, how the company would make money, how profits, losses, and expenses would be shared, venture capital, and Shih's availability to return to New York for important pitches or to relocate permanently. (Id. ¶ 93.) Among other topics the two discussed, Endicott suggested bringing in a

friend from law school as an additional founding member, but Shih expressed reservations about it and Endicott agreed that he would not promise equity in their venture to anyone without Shih's prior approval.[1] (Id.) Endicott accepted responsibility for incorporating the company and the two agreed to share its equity, expenses, profits, and losses in equal proportion. (Id.) The two agreed that the task of fundraising would be delegated entirely to Endicott due to his background as an investment banker and attorney, and his ability to pitch in person in New York. (Id.) And the two agreed that if early fundraising efforts were successful, it would signal that the concept had passed an initial viability "litmus test," whereby Shih would begin planning to relocate to New York permanently. (Id.)

On or about June 6, 2015, Shih and Endicott discussed potential names for their company via Facebook Messenger, and Shih reiterated her preference that the company be called CreditBridge. (Id. ¶ 107.) Shortly thereafter, the two held a Skype meeting during which they settled on the name CreditBridge and discussed issues relating to the company such as product

[1] The SAC alleges that Gross, who graduated from Harvard Law School the same year as Endicott, is the friend Endicott referenced during the meeting. (SAC ¶ 166.) As discussed below, unbeknownst to Shih, Gross appears to have joined Endicott as a co-founder of the business venture in or around July 2015. (Id. ¶ 136.)

development, team members, consumer behavior, and venture capital. (Id. ¶ 108.) During the meeting, Shih advised Endicott that work obligations and an upcoming three-week vacation to the South Island of New Zealand would temporarily limit her ability to work on CreditBridge. (Id. ¶ 111.) Shih inquired whether Endicott wanted to purchase some of her interest in CreditBridge so that he could tell investors that he held a controlling stake in the company, but Endicott rejected the proposal. (Id.) Since it was "your idea," Endicott told Shih, he did not want to work on CreditBridge without her as his equal partner. (Id.) The two agreed that they would finalize a business proposal slide deck and take CreditBridge into a "pitch phase," with Endicott soliciting investment from venture capitalists and other investors while Shih was on her vacation. (Id. ¶ 112.) Endicott agreed to report any significant developments back to Shih but reminded her that his full-time investment banking job demanded most of his time so she should expect some delay as to his progress raising funds. (Id.)

Around the same time as their Skype meeting, Endicott sent Shih an email with the subject line, "Slide Deck," in which he stated, "here's the slide deck I'm referring to" and attached a document titled "CreditBridge Business Plan Deck." (Id. ¶ 113.) The "CreditBridge Business Plan Deck" contained proposed slides for Endicott's pitch to investors. (Id. ¶¶ 114, 117.) The SAC

alleges that, although the version sent with Endicott's email was incomplete, Shih and Endicott both understood that the slide deck would be finalized utilizing the concepts, market research, and business models that the two jointly discussed—which Endicott did later in day of their Skype meeting. (Id. ¶¶ 115–16.)

E. Endicott and Gross launch CreditBridge, Inc. without Shih

Soon after their June 6, 2015, Skype meeting, Endicott took steps to organize and promote CreditBridge by registering a company website and Twitter account, and launching a logo contest which described the company as "a credit provider for new immigrants/migrants to the United States."[2] (Id. ¶¶ 121, 124–26.) Endicott also continued working on the CreditBridge Business Plan Deck, which incorporated Shih's credit bridging business model and Shih and Endicott's joint work product. (Id. ¶¶ 129–31.)

On or about June 28, 2015, Shih sent a message to Endicott while she was on her vacation to "touch base" about

[2] The SAC further alleges that, at the time the SAC was filed, the web address Endicott registered on or about June 11, 2015, redirects visitors to Petal's website, and the logo that he selected from the design contest was used as CreditBridge, Inc.'s primary logo until the company changed its name to Petal in September 2016. (SAC ¶¶ 122, 127, 201.)

CreditBridge. (Id. ¶ 119.) Endicott never responded. (Id. ¶ 120.)

Beginning in July 2015, Gross's name began to appear on CreditBridge's presentation materials. (Id. ¶ 136.) On or around July 13, 2015, Endicott and Gross prepared a "teaser" company announcement that introduced CreditBridge and stated that the company was seeking financing "to enable rapid growth and product development," just as Shih and Endicott had agreed. (Id. ¶ 138.) The SAC alleges that Shih's ideas, research, and work product are prominently featured in the materials Endicott and Gross used to attract financing, and it sets forth specific examples. (Id. ¶¶ 139, 143.) A few days later, Endicott and Gross sent an email to a consumer advocacy nonprofit in which they introduced themselves as "co-founder[s] of a consumer finance venture that is seeking to broaden consumer credit opportunities for new arrivals to the United States (e.g., immigrants)" and they were "in the preliminary phases of launching a business." (Id. ¶ 140.) Endicott and Gross's message made no mention of Shih. (Id.)

On or about August 8, 2015, Shih sent Endicott a message via Facebook Messenger to wish him a happy birthday expecting that her message would prompt an update from him regarding his progress with CreditBridge. (Id. ¶ 141.) Endicott did not respond. (Id.) Unbeknownst to Shih, however, around that same

time, Endicott, Gross, and Ustun were preparing to meet with venture capitalists. (Id. ¶ 142.) The meeting took place on August 11, 2015, during which Endicott and/or Gross pitched Shih's credit bridging model and work product without ever mentioning her. (Id. ¶ 143.) On August 12, 2015, Shih sent Endicott an email after seeing a Facebook post by Endicott's girlfriend, Yulia Fradkin ("Fradkin")—whom Shih knew personally from her time in New York—advertising for a computer scientist, software engineer, or statistician for CreditBridge. (Id. ¶¶ 144–47.) Once again, Endicott did not respond. (Id. ¶ 146.) Later that month, Shih sent a message via Facebook Messenger to Fradkin which stated:

> [H]ey Yulia, did you manage to verify Andrew [Endicott] is in fact alive and well?
>
> I saw your post about CreditBridge looking for a new data person. I don't know if Andrew mentioned but CreditBridge is my idea. I suggested it to him in April and we worked on it for the next few months but I wasn't sure if he was still interested?
>
> Can you get him to give me a buzz if you do find him, cheers!

(Id. ¶ 147.) Shortly thereafter, Fradkin replied that Endicott was "in Turkey right now" and "yeah I think they are trying to see if there is general investor interest." (Id. ¶ 148.) Shih was grateful to learn that Endicott was pursuing financing despite having to travel internationally, which helped to explain why he had not followed up regarding his progress. (Id.

¶ 149–50.) From then on, Shih allowed Endicott to pursue financing for CreditBridge without interference from her, believing that he was carrying out their agreement and that Endicott would follow up, as he said he would, when he had something significant to report. (Id. ¶ 152.)

F. Shih learns that Endicott has launched CreditBridge, Inc. without her

Approximately five months later, in early-February 2016, Endicott and Gross formally incorporated CreditBridge in the State of Delaware. (Id. ¶ 156.) On or about February 14, 2016, Shih became aware that Endicott's and Gross's LinkedIn profiles listed their positions as co-founders of CreditBridge, Inc., which, based on statements on the company's website, indicated that Endicott and Gross were pursuing the business model that Shih had disclosed to and developed with Endicott. (Id. ¶¶ 157–162.) Shih attempted to access the Dropbox she had shared with Endicott with their work product but discovered that Endicott had removed her access to it. (Id. ¶ 164.)

On or about February 16, 2016, Shih sent an email to Endicott and Gross at their CreditBridge email addresses. (Id. ¶ 170.) The email was directed to Endicott and subject lined "CreditBridge's Future," and in it Shih explained that she was "writing to you to express my concern at the way I have been treated in the formation of CreditBridge." (Id.) "CreditBridge

was my business idea which I shared with you on the mutual understanding that we would pursue its development in partnership," Shih wrote. (Id.) Shih explained that "[w]hen you did not reply to my attempt to contact you last June I charitably believed that you had put CreditBridge on the backburner," and that she had hoped "we would be able to have an honest conversation about CreditBridge and our roles in its future." (Id.) However, Shih explained, the company's recent incorporation led her to believe that Endicott's "intent is clearly to cut me out of the business which I conceived of and pursued in good faith with you, and to which I am entitled to 50 per[]cent ownership." (Id.) Neither Endicott nor Gross responded to Shih's message. (Id. ¶ 171.)

On March 1, 2016, Shih resent her February 16, 2016 email to Endicott in a message to his personal email address. (Id. ¶ 174.) Once again, Endicott did not respond. (Id. ¶ 175.) On March 2, 2016, Shih sent a private message to Gross's LinkedIn account in which she explained that her earlier email to his CreditBridge email address "warrant[s] your attention and I want you to know that I am available to answer any questions you may have." (Id. ¶ 177.) Gross never responded. (Id. ¶ 178.)

On or around March 23, 2016, Shih sent a lengthy email to Gross alone in which she urged him to respond to her prior messages about CreditBridge and warned him against becoming

"complicit in [Endicott's] unethical conduct." (Id. ¶ 184.)

Approximately six hours later, Endicott emailed Shih and said:

> Hi Cassie,
>
> Thanks for your letter. It's nice to hear from you again. It's been too long since we've spoken and I hope all is well with you. I'm sorry that our relationship ended last year. I treated you poorly as a friend and I want to apologize for ending communication with you so abru[p]tly.
>
> Our lack of communication seems to have caused a misunderstanding on your part regarding my business, CreditBridge. This business has no connection whatsoever to anything that you and I discussed in the past. Contrary to what you've claimed in your letter, CreditBridge is a credit card company and is not based on any of your business ideas.
>
> CreditBridge is also just a startup, with no revenue, no customers, no material contracts, and no outside investors. I have no income now after leaving my job at [the financial firm], and I'm personally funding the start-up costs of the business. Needless to say, I've been racking up some pretty scary credit card debt.
>
> I was surprised by how you've portrayed me in your letter and I hope we can resume being friends. You're an incredibly intelligent and capable person, and I think it's a shame that we did not ever get the chance to work together. I really admire your passion and I encourage you to pursue your business ideas just as I've pursued mine. If I can ever be of any help to you, please let me know.
>
> I wish you the best of luck with everything!
>
> Regards,
> Andrew

(Id. ¶ 186.)

On or about March 25, 2016, Shih responded to Endicott's message, copying Gross. (Id. ¶ 189.) Shih explained that

"[f]rom the outside it appears that the company we worked on and CreditBridge Inc are the same company," and she asked Endicott to answer three questions regarding the origin of CreditBridge, Inc. and how it differed from the company that Shih and Endicott had been developing together. (Id. ¶ 189.) Neither Endicott nor Gross ever responded. (Id. ¶ 190.)

The following month, Shih sent an email to the same consumer advocacy nonprofit that Endicott and Gross contacted in July 2015. (Id. ¶ 196.) Shih's message—which copied Endicott and Gross—explained her role in CreditBridge, Inc.'s formation and offered to provide "written documentation" in support. (Id.) Shih asked the nonprofit to notify "any third parties who are potentially affected," and explained that, "[w]hile I don't wish for this to get any larger than it has to, I am determined to pursue a fair resolution . . . including through civil action against [Endicott] if he continues to refuse to resolve it with me directly." (Id.) Less than two hours later, Endicott replied to Shih's message, but removed Shih as an addressee. (Id. ¶ 197.) In his reply to the nonprofit, which copied Gross but omitted Shih, Endicott characterized Shih's email as "frivolous." (Id.) "We are following up on our end," Endicott wrote, "and we ask that you please ignore it. This is one of the downsides of a publicly listed email!" (Id.) Once again,

however, neither Endicott nor Gross ever sent a response to Shih. (Id. ¶ 198.)

Soon thereafter, Endicott and Gross halted all, or substantially all, of CreditBridge, Inc.'s marketing efforts, and they began taking steps to re-brand the company. (Id. ¶¶ 199–200.) In September 2016, CreditBridge, Inc. changed its name to Petal, but, the SAC alleges, the company continued—and continues—to use and take credit for Shih's credit bridging model and her work product. (Id. ¶¶ 201–02, 209–21.) The SAC further alleges that, in December 2016, Endicott and Gross executed a stock purchase agreement in which they issued approximately $3.4 million of the company's stock to investors, while falsely representing that "[t]here is no action, suit, [or] proceeding . . . [that is] to the Company's knowledge, currently threatened in writing against the Company or . . . any officer or director of the Company." (Id. ¶¶ 203–06.)

On October 2, 2018, Petal officially launched a credit card product targeting young adults, students, immigrants, and minorities who have not yet had the opportunity to build credit in the United States. (Id. ¶ 7.) Petal has raised over $80 million in financing and is self-valued at more than $200 million. (Id. ¶ 226.)

G. The Complaint

On June 19, 2018, Shih initiated this action by filing a complaint against Petal, Endicott, Gross, Ustun, and others. (ECF No. 1.) On October 31, 2018, Shih filed an amended complaint, dropping her claims against all defendants except Petal, Endicott, and Gross. (ECF No. 46.) On February 20, 2019, Defendants moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 67.) On July 30, 2019, while the motion to dismiss was pending, Shih sought leave to file a supplemental opposition brief based on newly discovered evidence she obtained through non-party discovery and her own independent investigations. (Letter from Peter S. Dawson to Hon. John F. Keenan (July 30, 2019), ECF No. 86.) The Court denied Shih's request but, with the consent of Defendants, granted her leave to file a second amended complaint with the new information. (ECF No. 92.) Shih filed the SAC on September 12, 2019. (ECF No. 93.)

The SAC asserts eleven total claims for relief. Against Endicott and Petal, Shih asserts claims for breach of fiduciary duty, breach of actual or implied contract, breach of the covenant of good faith and fair dealing, and promissory estoppel (Counts I, V, VI, and VII, respectively). Against Gross and Petal, Shih asserts a claim for aiding and abetting breach of fiduciary duty (Count II); and a separate breach of fiduciary

duty claim against Gross alone (Count III). Against all defendants, Shih asserts claims for breach of corporate fiduciary duties, misappropriation of business idea, unjust enrichment, and unfair competition (Counts IV, VIII, IX, and X, respectively). Finally, Shih seeks a declaratory judgment against Petal, establishing her as an equitable shareholder and determining her interest in the company (Count XI).

On December 9, 2019, Defendants moved to dismiss the SAC in its entirety for failure to state a claim upon which relief may be granted. (ECF No. 102.) The Court heard the motion during a telephonic argument on August 27, 2020.

II. Legal Standard Governing Rule 12(b)(6) Motions to Dismiss

"Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." Keiler v. Harlequin Enters. Ltd., 751 F.3d 64, 70 (2d Cir. 2014). "Consequently, to survive a motion under Rule 12(b)(6), a complaint does not need to contain detailed or elaborate factual allegations, but only allegations sufficient to raise an entitlement to relief above the speculative level." Id.

"[I]n deciding a Rule 12(b)(6) motion to dismiss a complaint, [the Court] is required to accept all 'well-pleaded factual allegations' in the complaint as true." Lynch v. City of New York, 952 F.3d 67, 74–75 (2d Cir. 2020) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)). "Although allegations that are conclusory are not entitled to be assumed true, when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. at 75 (brackets, emphasis, and internal citations and quotation marks omitted). "The court must also 'construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff.'" Id. (quoting Arar v. Ashcroft, 585 F.3d 559, 567 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010)). "The assessment of whether a complaint's factual allegations plausibly give rise to an entitlement to relief 'does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal' conduct." Id. (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)). "The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." Anderson News, LLC

v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012), cert. denied, 568 U.S. 1087 (2013).

III. Endicott

The SAC asserts eight counts against Endicott. Each is discussed in turn below.

A. Breach of actual or implied contract (Count V)

"To make out a viable claim for breach of contract a 'complaint need only allege (1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages.'" Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y., 375 F.3d 168, 177 (2d Cir. 2004). Under New York law,

> [a] contract implied in fact may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the "presumed" intention of the parties as indicated by their conduct. It is just as binding as an express contract arising from declared intention, since in the law there is no distinction between agreements made by words and those made by conduct.

Jemzura v. Jemzura, 330 N.E.2d 414, 420 (N.Y. 1975) (internal citations omitted); see also Farina v. Metro. Transportation Auth., 409 F. Supp. 3d 173, 216 (S.D.N.Y. 2019). "This type of contract still requires such elements as consideration, mutual assent, legal capacity and legal subject matter." Maas v. Cornell Univ., 721 N.E.2d 966, 970 (N.Y. 1999) (citing 1 Williston, Contracts § 1:5, at 22 (4th ed. 1990)).

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Indus. & Terminal Corp. v. New York State Dep't of Transp., 715 N.E.2d 1050, 1053 (N.Y. 1999). "[W]here the issue is whether the course of conduct and communications between the parties have created a legally enforceable agreement," Kolchins v. Evolution Markets, Inc., 96 N.E.3d 784, 787 (N.Y. 2018) (quoting Zheng v. City of New York, 973 N.E.2d 711, 721 (N.Y. 2012)) (brackets and internal quotation marks omitted), "it is necessary to look to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds," id. (quoting Brown Bros. Elec. Contrs. v. Beam Constr. Corp., 361 N.E.2d 999, 1001 (N.Y. 1977)) (ellipsis omitted). "In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain." Id. at 787–88 (quoting Brown Bros., 361 N.E.2d at 1001).

"If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract." Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp., 548 N.E.2d 203, 206 (N.Y. 1989). "However, while a mere agreement to agree, in

which a material term is left for future negotiations, is unenforceable, the terms of a contract do not need to be fixed with absolute certainty to give rise to an enforceable agreement." Kolchins, 96 N.E.3d at 788 (brackets and internal citations and quotation marks omitted).

The SAC alleges that an actual or implied joint venture agreement existed between Shih and Endicott, pursuant to which they agreed to "contribute their personal services toward the development, organization, and promotion of a company which would independently assess consumers' creditworthiness and extend credit to creditworthy individuals who were otherwise unable to access consumer credit through traditional means." (SAC ¶ 319.) The SAC further alleges that, during their May 2015 Skype meeting, Shih and Endicott expressly agreed that they would equally share the profits, losses, and equity of the company, and Endicott would be responsible for issuing the company's shares to himself and Shih in equal parts. (Id. ¶¶ 93, 321.) The SAC alleges that Endicott breached this agreement by, among other things, failing to provide Shih with 50% of CreditBridge, Inc.'s equity upon its incorporation, and failing to support her appointment as an executive officer in the company. (Id. ¶ 323.) In the alternative, the SAC alleges that Endicott breached his and Shih's agreement to start a company together by failing to solicit investment in the joint venture

he had agreed to undertake with Shih, which deprived her of the use of her novel credit gap business idea, among other benefits. (Id. ¶¶ 324–25.)

Defendants argue that Shih's contract and quasi-contract claims must be dismissed because the SAC does not plausibly allege the elements of contract formation, such as agreement on material terms, intent to be bound, shared control, and meaningful contributions by Shih to the venture. Accordingly, Defendants argue, Shih's claims fail, and it is not plausible to infer that Endicott owed her any legal obligations. The Court disagrees.

Construing all reasonable inferences in the light most favorable to Shih, as the Court must at this procedural stage, Lynch, 952 F.3d at 75, the SAC plausibly alleges an implied-in-fact joint venture agreement between Shih and Endicott. "A joint venture . . . is in a sense a partnership for a limited purpose, and it has long been recognized that the legal consequences of a joint venture are equivalent to those of a partnership." Gramercy Equities Corp. v. Dumont, 531 N.E.2d 629, 632 (N.Y. 1988) (citations omitted). "The elements of a joint venture are an agreement of the parties manifesting their intent to associate as joint venturers, mutual contributions to the joint undertaking, some degree of joint control over the enterprise, and a mechanism for the sharing of profits and

losses." Clarke v. Sky Exp., Inc., 118 A.D.3d 935, 935 (2d Dep't 2014).

> The ultimate inquiry in determining whether a joint venture exists is whether "the parties have so joined their property, interest, skills and risks that for the purposes of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit."

Solutia Inc. v. FMC Corp., 456 F. Supp. 2d 429, 445 (S.D.N.Y. 2006) (quoting Indep. Energy Corp. v. Trigen Energy Corp., 944 F. Supp. 1184, 1201 (S.D.N.Y. 1996)). "Significantly, the intent of the parties to form a joint venture may be implied from the totality of their conduct." Schultz v. Sayada, 133 A.D.3d 1015, 1016 (3d Dep't 2015).

Here, the totality of the parties' conduct plausibly alleges a legally enforceable partnership agreement between Shih and Endicott:

Offer, acceptance, and consideration. Affording Shih the benefit of every favorable inference, the SAC alleges a sufficiently definite offer by Endicott to, as he phrased it in his May 7, 2015 email to the freelance journalist, "set[] up a venture" with Shih "to tackle the gap in credit available to immigrants in the US due to various causes (e.g., lack of credit scores)." (SAC ¶ 72.) Shih manifested her acceptance of this offer, and she and Endicott provided the necessary

consideration, by working together throughout May and June 2015 to research and develop such a company. Accord Express Indus. & Terminal Corp., 715 N.E.2d at 1053 ("Generally, courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract."); Apfel v. Prudential-Bache Sec. Inc., 616 N.E.2d 1095, 1097 (N.Y. 1993) ("Under the traditional principles of contract law, the parties to a contract are free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value.").

Agreement on material terms. "Before a plaintiff may secure redress for the breach of an agreement, the promise made by the defendant must be sufficiently certain and specific so that the parties' intentions are ascertainable." Andor Group v. Benninghoff, 219 A.D.2d 573, 573 (2d Dep't 1995). Defendants argue there were "gaping holes" regarding the nature of Shih and Endicott's venture, including how it would be established and each party's respective role in the new company. The Court is not persuaded. Drawing all reasonable inferences in favor of Shih, the SAC plausibly alleges an agreement between the two to build a business together which would assess the creditworthiness of certain types of individuals in order to provide qualifying customers with access to United States-based

sources of credit. Indeed, the two agreed to name their new company "CreditBridge," and during Skype meetings in May and June 2015, they discussed and reached agreement on a variety of important topics. At the early procedural posture of this action, these allegations are "sufficient to raise an entitlement to relief above the speculative level." Keiler, 751 F.3d at 70; see also Cobble Hill Nursing Home, 548 N.E.2d at 206 ("[A]t some point virtually every agreement can be said to have a degree of indefiniteness, and if the doctrine is applied with a heavy hand it may defeat the reasonable expectations of the parties in entering into the contract.").

Intent. "Because the creation of a joint venture imposes significant duties and obligations on the parties involved, the parties must be clear that they intend to form a joint venture, which is a fiduciary relationship, and not a simple contract." Learning Annex Holdings, LLC v. Whitney Educ. Grp., Inc., 765 F. Supp. 2d 403, 412 (S.D.N.Y. 2011) (internal quotation marks omitted); see also Andor Group, 219 A.D.2d at 573. Defendants argue that Endicott never agreed to start a business with Shih, and the parties' conduct does not evidence an intent or promise by him to do so. The Court is not persuaded. Not only is this argument—which is essentially an affirmative defense—inappropriate on a motion to dismiss, it crumbles in the face of Endicott's own statements to Shih: for example, "Let's start a

company together," (SAC ¶ 27); "Let's create this things [sic]," (id. ¶ 53); and "Great, we're on the same page overall," (id. ¶ 76). It also crumbles in light of his statements to others: for example, to the freelance journalist in which Endicott said he was "working with a group that's setting up a venture to tackle the gap in credit available to immigrants in the US," (id. ¶ 72); or to Ustun in which Endicott forwarded his discussions with Shih even after he had admitted to Ustun that Shih was the one "who came up with the idea," (id. ¶¶ 78–80, 85, 91). These documentable facts, to say nothing of the SAC's other detailed allegations regarding the content of Shih and Endicott's oral discussions, plausibly allege that Endicott intended a joint venture with Shih to capitalize on her idea of a credit bridging service. Accord Schultz, 133 A.D.3d at 1016–17 (finding "the evidence of the whole of their relationship amply demonstrates that they entered into a joint venture"); Griffith Energy, Inc. v. Evans, 85 A.D.3d 1564, 1565–66 (4th Dep't 2011) (affirming trial court's finding of intent based on the defendant's conduct); Czernicki v. Lawniczak, 74 A.D.3d 1121, 1125 (2d Dep't 2010) (finding the parties' conduct evidenced an intent to enter into an oral partnership agreement); see also Brown Bros. 361 N.E.2d at 1002 ("[W]here a finding of whether an intent to contract is dependent . . . on other evidence from which differing inferences may be drawn, a question of fact arises.").

Shared control and meaningful contributions. Defendants argue that Shih never acted like she was involved in a joint venture or had decision-making authority. Instead, they argue, Shih did "nothing" as Endicott and Gross created what is now Petal. Once again, the Court is not persuaded. Contrary to Defendants blanket assertions wholly at odds with the facts alleged, the SAC includes specific allegations regarding Shih's influence over the joint venture when, for example, she appears to have persuaded Endicott to consider "lending money in-house," (SAC ¶¶ 71, 75–76), or that "it's not too early to start thinking about start-up money and possible places to get it," (id. ¶¶ 77, 84). The SAC also alleges that Shih expressed reservations about bringing on new partners after Endicott suggested bringing in a friend from law school (alleged to be Gross), to which "Endicott agreed that he would not promise equity in their venture to anyone without Shih's prior approval." (Id. ¶ 93.) Finally, regarding Shih's meaningful contributions, Defendants would have the Court not only ignore the SAC's allegations regarding where the joint venture's credit bridging concept originated, but also Shih's research and analysis during May and June 2015, (id. ¶¶ 56–76), and the SAC's comprehensive overview of how her contributions are prominently featured in the materials Endicott and Gross used to attract financing, (id. ¶¶ 137–139).

Accordingly, the SAC plausibly alleges, at a minimum, an oral joint venture agreement between Shih and Endicott, which Endicott subsequently breached by abruptly and surreptitiously cutting Shih out of the "CreditBridge" enterprise that, consistent with the terms of their partnership, he began pitching to potential investors in July 2015, and later incorporated as CreditBridge, Inc.

B. Breach of the covenant of good faith and fair dealing (Count VI)

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 773 N.E.2d 496, 500 (N.Y. 2002). This implied covenant "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract," Dalton v. Educ. Testing Serv., 663 N.E.2d 289, 291 (N.Y. 1995) (internal quotation marks omitted), and it "encompass[es] any promises which a reasonable person in the position of the promisee would be justified in understanding were included," 511 W., 773 N.E.2d at 500–01 (internal quotation marks omitted). "[S]o long as the promisee is allowed to reap the benefits of the contract, the implied covenant of good faith does not require the promisor to take actions contrary to his own economic interest." Travelers Indem. Co. of Illinois v. CDL

Hotels USA, Inc., 322 F. Supp. 2d 482, 494 (S.D.N.Y. 2004). "New York law," however, "does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled." Harris v. Provident Life & Acc. Ins. Co., 310 F.3d 73, 81 (2d Cir. 2002).

Defendants argue this claim must be dismissed because it is duplicative of Shih's breach of contract claim. The Court disagrees. Here, in addition to plausibly alleging Endicott's breach of their joint venture agreement by withholding from Shih her rightful interest in CreditBridge, Inc., the SAC alternatively—and plausibly—alleges that, if CreditBridge, Inc. is not the company of Shih and Endicott's partnership, Endicott nevertheless breached the implied covenant by using Shih's idea, their joint efforts, and her work product to establish a directly competing company under the exact same name. (SAC ¶ 334.) Accordingly, at this stage, the SAC's implied covenant claim is not duplicative, but rather, is permitted as an alternative pleading pursuant to Federal Rule of Civil Procedure 8(d)(3).

C. Breach of fiduciary duties

"To state a claim for breach of fiduciary duty, a plaintiff must plausibly allege facts demonstrating 'breach by a fiduciary of a duty owed to plaintiff; defendant's knowing participation

in the breach; and damages.'" Galvstar Holdings, LLC v. Harvard Steel Sales, LLC, 722 F. App'x 12, 15 (2d Cir. 2018) (summary order) (quoting SCS Commc'ns, Inc. v. Herrick Co., 360 F.3d 329, 342 (2d Cir. 2004)). "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" EBC I, Inc. v. Goldman, Sachs & Co., 832 N.E.2d 26, 31 (N.Y. 2005) (quoting Restatement (Second) of Torts § 874, cmt. a). "Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed." Galvstar Holdings, 722 F. App'x at 15 (quoting Penato v. George, 52 A.D.2d 939, 942 (2d Dep't 1976)).

1. Co-venturer fiduciary duties (Count I)

"Under New York law, parties who enter into a joint venture owe each other fiduciary obligations." Herman v. Duncan, No. 17 Civ. 3325 (PGG), 2019 WL 2137335, at *15 (S.D.N.Y. May 16, 2019). "[C]oventurers, like co-partners, owe each other the finest loyalty and the utmost good faith throughout the course of the enterprise." Zeising v. Kelly, 152 F. Supp. 2d 335, 347 (S.D.N.Y. 2001); see also Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

As discussed above, the SAC plausibly alleges an oral joint venture between Shih and Endicott to build a company together called CreditBridge, which was to provide access to credit to certain individuals in the United States who were otherwise unable to access it through traditional means. Accordingly, Shih and Endicott owed each another "the duty of the finest loyalty[;] . . . [n]ot honesty alone, but the punctilio of an honor the most sensitive," Meinhard, 164 N.E. at 546, which Endicott betrayed by misappropriating the venture for himself and concealing his disloyalty from Shih in order to wrongfully exclude her from CreditBridge, Inc. and withhold her rightful interest in the company. At this time, the Court need not resolve whether the SAC also plausibly alleges Endicott's breach of certain other fiduciary duties, such as those owed by an attorney, corporate promoter, or agent. (SAC ¶¶ 248–282.)

2. Corporate fiduciary duties (Count IV)

"In general, officers and directors owe fiduciary duties, including a duty of loyalty and a duty of care, to a corporation and its shareholders." United States Small Bus. Admin. v. Feinsod, 347 F. Supp. 3d 147, 158 (E.D.N.Y. 2018). "The duty of care requires officers and directors to perform their duties 'in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.'" Id. at 159 (quoting N.Y. Bus. Corp. Law §§

715(h) (officers), 717(a) (directors)). "[T]he duty of loyalty[] derives from the prohibition against self-dealing that inheres in the fiduciary relationship." Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 264 (2d Cir. 1984).

The SAC alleges that Shih and Endicott were equal owners and de facto shareholders in the enterprise later incorporated as CreditBridge, Inc., and that Endicott (and Gross) wrongfully deprived Shih of her interest in the company, which is now known as Petal. (SAC ¶¶ 235, 270). Accordingly, the SAC alleges, Endicott (and Gross) breached corporate fiduciary duties owed to Shih as a de facto shareholder by failing to include her in issuances of CreditBridge, Inc. stock and executive compensation. (Id. ¶¶ 310–12.) As discussed above, the SAC plausibly alleges an agreement between Shih and Endicott to build and share ownership of a company indistinguishable from CreditBridge, Inc. This is sufficient, at this procedural stage, to plausibly support a claim for breach of corporate fiduciary duties: If Shih was entitled to shares of CreditBridge, Inc., Endicott breached duties of loyalty and care in his capacity as an officer and director by consciously withholding from Shih her rightful interest in the company. See Feinsod, 347 F. Supp. 3d at 165 (allowing breach of corporate fiduciary duty claim to move forward where "plaintiff has

plausibly alleged that defendants' actions lacked good faith and legitimate corporate purpose").

D. Misappropriation of business idea (Count VIII)

"In order for an idea to be susceptible to a claim of misappropriation, two essential elements must be established: the requisite legal relationship must exist between the parties, and the idea must be novel and concrete." Turner v. Temptu Inc., 586 F. App'x 718, 722 (2d Cir. 2014) (summary order) (quoting McGhan v. Ebersol, 608 F. Supp. 277, 284 (S.D.N.Y. 1985)). "The legal relationship between the plaintiff and defendant may be either a fiduciary relationship, or based on an express contract, an implied-in-fact contract, or a quasi-contract." Id. (quoting McGhan, 608 F. Supp. at 284). Regarding the element of novelty, "[t]he primary issue is whether plaintiff had an enforceable property right in the idea [she] disclosed to defendant." Am. Bus. Training Inc. v. Am. Mgmt. Ass'n, 50 A.D.3d 219, 222 (1st Dep't 2008).

Defendants argue that Shih's idea for a credit bridging service was not novel or concrete enough to be misappropriated, and even if it was, neither Endicott nor Gross ever made use of her idea. The Court disagrees.

Novelty. "[W]hen one submits an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality

are absent, since the property right in an idea is based upon these two elements." Downey v. Gen. Foods Corp., 286 N.E.2d 257, 259 (N.Y. 1972); see also Am. Bus. Training, 50 A.D.3d at 222–23. However,

> where the idea at issue was disclosed to the defendant, and the defendant, following its disclosure, entered into a contract to pay the plaintiff for it . . . the plaintiff need not establish that the idea was novel; the circumstances establish that the plaintiff provided something of value to the defendant, and therefore the plaintiff is entitled to the benefit that the contract provided for, in exchange for that consideration.

Am. Bus. Training, 50 A.D.3d at 223 (emphasis in original) (discussing the holding in Apfel, 616 N.E.2d at 1098). "[A] party who claims that an idea was misappropriated need not establish that the idea was novel and original if its value to the defendant was established by the creation of a contract between the parties following disclosure of the idea to the defendant." Id. (emphasis omitted).

As discussed above, the SAC plausibly alleges an agreement between Shih and Endicott to build a company based on Shih's credit bridging idea. Even if the Court were to credit Defendants' argument that Shih's idea was not sufficiently novel—which is belied by Endicott's own actions and statements in response, his concern that someone else would steal the idea, and his remarkable admission to Ustun that Shih was the one "who came up with the idea"—the well-pleaded allegation of an

implied-in-fact contract following Shih's disclosure satisfies the novelty requirement of this claim.

Concreteness. Defendants argue that Shih's idea was not concrete enough to be misappropriated because her idea merely identified a problem in the world—it did not involve a sufficiently detailed or defined solution to the problem. The Court is not persuaded. Here, the SAC alleges a solution: After Endicott asked Shih to elaborate on her idea, and before the two agreed to create CreditBridge together, Shih described to him a company that would independently "vet" the creditworthiness of individuals and would extend credit or underwrite the risk of a U.S. bank's extension of credit to such individuals. (SAC ¶ 50.) Indeed, Endicott's own responses that "the idea is viable" and "[t]here's a problem, and this would solve that problem" plausibly allege a concrete idea for a company the two subsequently began working to bring to life.

Use of the idea. Defendants argue that Endicott built CreditBridge, Inc. without Shih's help using his own work product and proprietary ideas. The Court is not persuaded. Not only is this type of counterfactual argument inappropriate on a motion to dismiss, the SAC very clearly and plausibly alleges the opposite: that Endicott took and used Shih's idea. Indeed, Endicott worked with Shih in the beginning to develop the idea into a business in which others would want to invest, but

instead of terminating their oral agreement—which he could have done at any time—Endicott simply cut off communication with Shih and seized the venture for himself.

E. Unfair competition (Count X)

"The essence of an unfair competition claim under New York law is that the defendant misappropriated the fruit of plaintiff's labors and expenditures by obtaining access to plaintiff's business idea either through fraud or deception, or an abuse of a fiduciary or confidential relationship." Telecom Int'l Am., Ltd. v. AT&T Corp., 280 F.3d 175, 197 (2d Cir. 2001) (quotation marks omitted); see also Bytemark, Inc. v. Xerox Corp., 342 F. Supp. 3d 496, 505 (S.D.N.Y. 2018).

As discussed above, the SAC plausibly alleges a claim for breach of the covenant of good faith and fair dealing that is not duplicative of Shih's breach of contract claim, as well as standalone claims for idea misappropriation and breach of fiduciary duty, against Endicott. Accordingly, the SAC's unfair competition claim against him is likewise sufficient—and it may not be dismissed as duplicative at this time—because the SAC plausibly alleges, as an alternative theory of liability, Endicott's unfair use of Shih's idea, their joint efforts, and her work product to establish a directly competing company.

F. Promissory estoppel (Count VII)

"To make out a claim for promissory estoppel, a plaintiff must [plausibly allege] (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the promisee, and (3) unconscionable injury to the relying party as a result of the reliance." Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 301 (2d Cir. 1996); see also Hanson v. Hanson, No. 18 Civ. 695 (KPF), 2019 WL 935127, at *9 (S.D.N.Y. Feb. 26, 2019).

Defendants argue that the SAC's promissory estoppel claim must be dismissed as both duplicative and because Shih does not plausibly allege a clear and unambiguous promise by Endicott on which she foreseeably relied. The Court disagrees.

Under New York law,

> [a]lthough the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter, where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies.

Sabre Int'l Sec., Ltd. v. Vulcan Capital Mgmt., Inc., 95 A.D.3d 434, 438–39 (1st Dep't 2012) (brackets and internal citations and quotation marks omitted). As discussed above, a bona fide dispute exists as to the existence of an oral joint venture agreement between Shih and Endicott. The SAC's promissory

estoppel claim is permitted at this procedural stage as an alternative pleading.

G. Unjust enrichment (Count IX)

"To prevail on a claim for unjust enrichment in New York, a plaintiff must establish (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution." Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc., 448 F.3d 573, 586 (2d Cir. 2006) (quotation marks omitted). "The 'essence' of such a claim 'is that one party has received money or a benefit at the expense of another.'" Kaye v. Grossman, 202 F.3d 611, 616 (2d Cir. 2000) (quoting City of Syracuse v. R.A.C. Holding, Inc., 258 A.D.2d 905, 906 (4th Dep't 1999)). "While a party generally may not simultaneously recover upon a breach of contract and unjust enrichment claim arising from the same facts, it is still permissible to plead such claims as alternative theories." Singer v. Xipto Inc., 852 F. Supp. 2d 416, 426 (S.D.N.Y. 2012).

As discussed above, the SAC plausibly alleges that Endicott was directly enriched at Shih's expense and that she is entitled to restitution as a result. Accordingly, the SAC's unjust enrichment claim is permitted at this time.

IV. Gross

The SAC asserts six counts against Gross. Each is discussed in turn below.

A. Aiding and abetting breach of fiduciary duty (Count II)

"To state a claim for aiding and abetting breach of fiduciary duty under New York law, a plaintiff must allege: (1) breach by a fiduciary of obligations to another; (2) actual knowing participation by the defendant in the fiduciary's breach of obligations; and (3) damages to the plaintiff." Mazzaro de Abreu v. Bank of Am. Corp., 525 F. Supp. 2d 381, 392 (S.D.N.Y. 2007).

Defendants argue that Gross did not aid and abet Endicott's breach of fiduciary duties because Endicott did not owe any duties to Shih and, even if he did, the SAC does not plausibly allege Gross's actual knowledge of nor his participation in any breach by Endicott. The Court disagrees.

As discussed above, the SAC plausibly alleges co-venturer fiduciary duties owed by Endicott to Shih, which he breached by wrongfully misappropriating their venture for himself and excluding her from it. Affording Shih the benefit of every reasonable inference, the SAC plausibly alleges Gross's actual knowledge of and participation in Endicott's breach based on (1) Shih's February 16, 2016 email to Endicott and Gross in which

she stated that "CreditBridge was my business idea which I shared with you [Endicott] on the mutual understanding that we would pursue its development in partnership"; (2) Shih's March 23, 2016 email to Gross alone, together with Endicott's quick—and only—response to Shih in which Endicott acknowledged a relationship with her ("I'm sorry that our relationship ended last year") and apologized for "treat[ing] you poorly as a friend" and "ending communication with you so abru[p]tly"; and (3) Shih's April 20, 2016 email to the consumer advocacy nonprofit in which she explained her role in CreditBridge, Inc.'s formation, and to which Endicott replied—removing Shih, but copying Gross on the message—characterizing Shih's email as "frivolous" and telling the nonprofit that "[w]e are following up on our end" when in fact, neither Endicott nor Gross ever contacted Shih again. These allegations, at this procedural stage, plausibly allege Gross's knowledge of partnership duties owed by Endicott to Shih, and Gross's actual knowing participation in Endicott's willful refusal to treat Shih with "the finest loyalty and the utmost good faith." Zeising, 152 F. Supp. 2d at 347.

B. Breaches of promoter fiduciary duties (Count III) and corporate fiduciary duties (Count IV)

"It is well settled that both before and after a corporation comes into existence, its promoter acts as the

fiduciary of that corporation and its present and anticipated shareholders." Roni LLC v. Arfa, 74 A.D.3d 442, 444 (1st Dep't 2010), aff'd, 963 N.E.2d 123 (N.Y. 2011). "Ascertaining the existence of a fiduciary relationship 'inevitably requires a fact-specific inquiry.'" Roni, 963 N.E.2d at 125.

The SAC alleges that Gross owed fiduciary duties to Shih based on his position as a corporate promoter of CreditBridge, Inc. and his role as an executive and director of the company, which Gross subsequently breached by, among other things, failing to provide Shih with her rightful 50% ownership interest. As discussed above, the SAC plausibly alleges that (1) Shih was an anticipated shareholder of CreditBridge, Inc., but when the company was incorporated, she was wrongfully deprived of her rightful interest in it; and (2) Gross knowingly participated in denying Shih any ownership interest in CreditBridge, Inc. or Petal. Accordingly, at this early stage of the litigation, the SAC adequately alleges Gross's breach of promoter fiduciary duties and the corporate fiduciary duties of loyalty and care, which he owed to Shih in her capacity as an anticipated or de facto shareholder of CreditBridge, Inc.

C. Misappropriation of business idea (Count VIII)

Defendants argue that Shih's misappropriation claim against Gross must be dismissed because the SAC does not plausibly

allege the required legal relationship between Gross and Shih when Shih shared her idea with Endicott. The Court agrees.

Shih's claim is essentially that she shared her idea with Endicott, who then used it to start CreditBridge, Inc. with Gross. Accordingly, Gross's liability arises out of his role in the company and its development. But by the time Gross became involved in the endeavor to where he could have owed any duties to Shih, Endicott had already appropriated Shih's idea and was discussing it with others. Indeed, the SAC alleges that, well before their May 16, 2015 Skype conversation during which Shih and Endicott allegedly formalized their agreement and Endicott suggested bringing on a friend from law school as an additional founding member, Shih was fully aware that Endicott was discussing her idea with others. (SAC ¶ 65–66 (on or about May 3, 2015, Endicott advised Shih that he was discussing her idea with third parties), ¶ 72 (on or about May 7, 2015, Endicott emailed the freelance journalist, blind copying Shih), ¶ 91 (Endicott forwarded to Shih his May 13, 2015 email to Ustun).) Count VIII, as against Gross, must be dismissed.

D. Unfair competition (Count X)

Defendants argue that this claim, as against Gross, must be dismissed for the same reasons as Shih's misappropriation of business idea claim against him. The Court disagrees.

"A claim of unfair competition does not necessarily require a showing of misappropriation of a . . . commercially novel idea that is produced by one party," but instead "may apply in cases involving . . . the misappropriation of a party's work product." Sokol Holdings, Inc. v. BMB Munai, Inc., 726 F. Supp. 2d 291, 302 (S.D.N.Y. 2010) (collecting cases). Here, the promoter and corporate fiduciary duties Gross owed to Shih discussed above, together with the SAC's allegations that Petal "continues to implement the fundamental components" of Shih's idea and work product, (SAC ¶¶ 212–19), plausibly allege an unfair competition claim against Gross. See Telecom Int'l, 280 F.3d at 197 (explaining that an unfair competition claim may exist where a defendant misappropriates the fruit of a plaintiff's labors through abuse of a fiduciary relationship).

E. Unjust enrichment (Count IX)

Defendants argue that this claim must be dismissed because there was no relationship between Gross and Shih that could have caused reliance or inducement. The Court disagrees. "The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Mandarin Trading Ltd. v. Wildenstein, 944 N.E.2d 1104, 1110 (N.Y. 2011); see also Sokol Holdings, 726 F. Supp. 2d at 303 ("The essence of a claim for unjust enrichment is that one party has parted with

something of value that has been received by another at the first party's expense."). Accepting the SAC's allegations as true, this claim is sufficient for the same reasons as Shih's allegations of aiding and abetting liability against Gross: the SAC plausibly alleges that Gross knew of Shih's rightful claim to half of CreditBridge, Inc. By taking no action to return to Shih her rightful interest in the company, which in turn would have reduced Gross's own interest, Gross has been unjustly enriched at Shih's expense.

V. Petal

The SAC asserts ten counts against Petal. Each is discussed in turn below.

A. Breach of actual or implied contract (Count V)

Under New York law, "[a] corporation may bind itself to the terms of a preincorporation contract if it knowingly accepts the benefits referable to the contract." Universal Indus. Corp. v. Lindstrom, 92 A.D.2d 150, 152 (4th Dep't 1983); see also Reif v. Williams Sportswear, Inc., 174 N.E.2d 492, 494 (N.Y. 1961) ("It is a familiar principle that a corporation will be liable on a contract of its promoters only if adopted, either expressly or by acceptance of benefits referable to that contract."); Cont'l Indus. Grp., Inc. v. Equate Petrochemical Co., 586 F. App'x 768, 771 (2d Cir. 2014) (summary order) (explaining Reif sets forth the test by which a corporation may be liable on a pre-

incorporation contract). Knowing acceptance "gives rise to corporate liability in addition to any individual liability." Universal Indus. Corp., 92 A.D.2d at 152.

The parties vigorously dispute whether CreditBridge, Inc. and/or Petal are sufficiently similar to the "CreditBridge" of Shih and Endicott's joint venture, such that Endicott's agreement with Shih to, among other things, issue to her a 50% ownership interest, constitutes a pre-incorporation contract that Petal must honor. At this early procedural stage, however, the Court must assume the veracity of the SAC's allegations, including its assertions that Petal—"a credit card company that extends credit to individuals with little to no credit history in the United States, primarily targeting young adults, students, immigrants, and minorities," (SAC ¶ 1)—is the same company that Shih and Endicott agreed to develop—"a company which would independently assess consumers' creditworthiness and extend credit to creditworthy individuals who were otherwise unable to access consumer credit through traditional means," (id. ¶ 319). As discussed above, the SAC plausibly alleges idea misappropriation by Endicott. Accordingly, the SAC plausibly alleges that CreditBridge, Inc.—through one of its founders, Endicott—knowingly accepted certain benefits from Shih and Endicott's joint venture agreement, such as Shih's business idea and her meaningful contributions to the partnership. Taking the

SAC's allegations as true, CreditBridge, Inc.'s failure to issue to Shih 50% of the company's equity constitutes breach of Shih and Endicott's pre-incorporation agreement, which, at this stage, may be imputed to Petal. See, e.g., Reif, 174 N.E.2d at 494–95; Eden Temp. Servs., Inc. v. House of Excellence Inc., 270 A.D.2d 66, 67 (1st Dep't 2000) (holding pre-incorporation oral agreement was ratified where corporation continued to accept the benefits of the contract after the company's formation).

B. Vicarious liability for Endicott's and Gross's alleged misconduct (Counts I, II, IV, VII, VIII, IX, and X)

The SAC alleges that Petal is vicariously liable for Endicott's and Gross's (1) individual breaches of fiduciary duties (Counts I and IV) and aiding and abetting such breaches (Count II); (2) promissory estoppel (Count VII); (3) idea misappropriation (Count VIII); (4) unjust enrichment (Count IX); and (5) unfair competition (Count X). Shih argues that liability may be imputed to Petal because she was an "equitable shareholder" of the company, and because Petal was the alter ego of Endicott and Gross. Defendants counter that Shih's "equitable shareholder" argument is baseless as no court has ever held a corporation liable under similar facts, and her alter ego theory of liability is not plausibly alleged because Petal was not a sham company or incorporated solely to commit fraud.

"In a diversity case, we apply the choice of law rules of the forum state—in this case New York—to determine what law governs alter ego or piercing the corporate veil analysis." Am. Fuel Corp. v. Utah Energy Dev. Co., 122 F.3d 130, 134 (2d Cir. 1997). "New York choice of law rules provide that generally the law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders." Fillmore E. BS Fin. Subsidiary LLC v. Capmark Bank, 552 F. App'x 13, 15 (2d Cir. 2014) (summary order) (internal quotation marks omitted). Because Petal is a Delaware corporation, Delaware law governs whether it may be held vicariously liable as the alter ego of Endicott and Gross.

"Delaware courts take the corporate form . . . very seriously," Case Fin., Inc. v. Alden, No. 1184-VCP, 2009 WL 2581873, at *4 (Del. Ch. Aug. 21, 2009), disregarding it "only in exceptional circumstances," Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260, 270 (D. Del. 1989). Nevertheless, "[u]nder Delaware law, the corporate veil may be pierced, 'in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved.'" Gristede's Foods, Inc. v. Madison Capital Holdings LLC, 174 A.D.3d 455, 456 (1st Dep't 2019) (quoting

Pauley Petroleum Inc. v. Cont'l Oil Co., 239 A.2d 629, 633 (Del. 1968)).

"[C]ourts have disregarded the legal distinction between a business entity and the individuals who hold ownership interests in that entity, if maintaining the distinction would 'produce injustices or inequitable consequences.'" Sky Cable, LLC v. DIRECTV, Inc., 886 F.3d 375, 385 (4th Cir. 2018). "In such circumstances, a court may 'pierce the veil' separating the entity and its constituent members and treat the entity and its members as identical." Id. "Just as traditional veil piercing permits a court to hold a member liable for a company's actions, reverse veil piercing permits a court to hold a company liable for a member's actions if recognizing the corporate form would cause fraud or similar injustice." Id. at 387. Determining whether to disregard the corporate form "requires a fact intensive inquiry." Alden, 2009 WL 2581873, at *4.

Affording Shih the benefit of every reasonable inference, the SAC plausibly alleges that Endicott and Gross wrongfully utilized their absolute control over CreditBridge, Inc., (SAC ¶¶ 156, 202 (alleging Endicott and Gross controlled 100% of the company's board of directors)), to unjustly deprive Shih of her rightful interest in the company. This allowed Petal to allocate a greater portion of its common stock to Endicott, Gross, and others, and to misappropriate Shih's valuable

contributions to the very creation of the company, all in contravention of Shih and Endicott's agreement, the fiduciary duties she was owed, and Shih's property interest in her idea for a credit bridging service. Indeed, "[i]n Delaware, to prevail under an alter ego theory, a plaintiff is not required to show actual fraud but must show a mingling of the operations of the entity and its owner plus an overall element of injustice or unfairness." Sky Cable, 886 F.3d at 389 (internal quotation marks omitted). Accordingly, the SAC plausibly alleges facts upon which Delaware courts may recognize Petal's alter ego liability for the tortious conduct of Endicott and/or Gross alleged in Counts I, II, IV, VII, VIII, IX, and X. See id. at 387–88 (holding Delaware law would recognize reverse veil-piercing in certain situations and noting that "in Delaware, disregarding the corporate fiction 'can always be done if necessary to prevent fraud or chicanery'") (emphasis in original); but see Gristede's Foods, 174 A.D.3d at 456–57 (holding "a garden variety breach of contract" claim does not permit veil-piercing under Delaware law).

C. Breach of the covenant of good faith and fair dealing (Count VI)

The SAC alleges that Petal inherits liability flowing from Endicott's breach of the covenant of good faith and fair dealing. Defendants argue this claim must be dismissed as

duplicative of Shih's breach of contract claim. The Court agrees with Defendants.

"[W]hen a complaint alleges both a breach of contract and a breach of the implied covenant of good faith and fair dealing based on the same facts, the latter claim should be dismissed as redundant." Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 125 (2d Cir. 2013). Here, Petal's liability arises out of Shih and Endicott's agreement to equitably share ownership of the credit bridging company they agreed to build together. If there was an agreement between the two that Endicott breached by withholding Shih's share of the company, Petal may be liable for breach of contract as discussed above, and any alleged breach of the implied covenant is redundant. See id. If there was no agreement, Endicott cannot have breached the implied covenant. See Travelers, 322 F. Supp. 2d at 493–94. If, however, there was an agreement, but Endicott did not breach it by denying Shih an interest in CreditBridge, Inc., but under which he did destroy the fruit of Shih's bargain, liability still cannot be imputed to Petal: Endicott's misuse of Shih's idea and work product to start a competing company is not a sufficient "injustice" to permit alter ego liability, cf. Gristede's Foods, 174 A.D.3d at 456–57, nor can it serve as a basis for liability under a shareholder theory where Shih would not be an equitable

or de facto shareholder of the competing company, CreditBridge, Inc. Count VI, as against Petal, must be dismissed.

D. Declaratory judgment (Count XI)

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). The Act thus "confers on federal courts 'unique and substantial discretion in deciding whether to declare the rights of litigants.'" Peconic Baykeeper, Inc. v. Suffolk Cnty., 600 F.3d 180, 187 (2d Cir. 2010) (quoting Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995)).

Shih requests a declaratory judgment determining her to be an equitable shareholder of Petal entitled to a 50% equity interest in the company. As discussed above, an "actual controversy" exists between the parties. Accordingly, declaratory judgment may "serve a useful purpose in clarifying and settling the legal relations in issue" or "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Bristol-Myers Squibb Co. v. SR Int'l Bus. Ins. Co., 354 F. Supp. 2d 499, 506 (S.D.N.Y. 2005) (quotation marks omitted). Count XI survives.

VI. Constructive Trust and Specific Performance

In addition to compensatory damages, Shih requests that she be awarded a constructive trust and specific performance. Defendants oppose the requests.

A. Constructive trust

"New York law requires four elements to prove a constructive trust: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment." In re Ades & Berg Grp. Inv'rs, 550 F.3d 240, 245 (2d Cir. 2008). "A constructive trust is a remedy, not a cause of action, and is to be imposed only in the absence of an adequate remedy at law." Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 419 (S.D.N.Y. 2010) (internal quotation marks omitted); see also Abraham v. Am. Home Mortg. Servicing, Inc., 947 F. Supp. 2d 222, 235 (E.D.N.Y. 2013) ("It is well established that the existence of a contract precludes a claim for a constructive trust.").

Defendants argue that Shih's demand for a constructive trust should be dismissed because it is duplicative of her breach of contract claim, it would be unfair to award Shih half of a fully operational business, and monetary damages are adequate to make Shih whole. In her opposition, Shih does not contest that monetary damages would be adequate. Accordingly, the Court agrees with Defendants that Shih's demand for a

constructive trust may be dismissed. See Hanson, 2019 WL 935127, at *11 ("Plaintiff argues, and the Court agrees, that Defendant cannot state a claim for a constructive trust remedy because Defendant has counterclaimed for money damages and thus has an 'adequate remedy at law.'").

B. Specific performance

"In general, specific performance will not be ordered where money damages 'would be adequate to protect the expectation interest of the injured party.'" Sokoloff v. Harriman Estates Dev. Corp., 754 N.E.2d 184, 188 (N.Y. 2001). "Specific performance is a proper remedy, however, where 'the subject matter of the particular contract is unique and has no established market value.'" Id. "In determining whether money damages would be an adequate remedy, a trial court must consider, among other factors, the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damages award." Id.

Defendants argue that Shih's demand for specific performance should be dismissed because the SAC alleges a $200 million market value for Petal and monetary damages are sufficient compensation for the same reasons as in Shih's demand for a constructive trust. At this early procedural stage, however, the Court will not dismiss Shih's demand for specific performance without first allowing discovery on the issue. See

Vacold LLC v. Cerami, 545 F.3d 114, 130 (2d Cir. 2008) ("New York courts routinely award specific performance in cases involving the conveyance of stock in privately held corporations."); but see Lucente v. Int'l Bus. Machines Corp., 310 F.3d 243, 262 (2d Cir. 2002) ("[B]efore the 'extraordinary' equitable remedy of specific performance may be ordered, the party seeking relief must demonstrate that remedies at law are incomplete and inadequate to accomplish substantial justice.").

VII. Conclusion

For the reasons set forth above, Defendants' motion to dismiss the Second Amended Complaint is DENIED except as to Plaintiff's sixth claim for relief addressed to Defendant Petal Card, Inc., eighth claim for relief addressed to Defendant Jason Gross, and her demand for a constructive trust, all of which are dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

The Clerk of Court is directed to terminate the motion docketed at ECF No. 102.

SO ORDERED.

Dated: New York, New York
September 23, 2020

John F. Keenan
United States District Judge